

1 WO
2
3
4
5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 SuperMedia LLC, a Delaware limited) No. CV-12-2491-PHX-LOA
9 liability company, f/k/a Idearc Media)
10 LLC,)
11 Plaintiff,)
12 vs.)
13 Law Offices of Malkin & Associates)
14 P.L.L.C., an Arizona professional limited)
15 liability company; and Gregory Malkin)
16 P.L.L.C., an Arizona professional limited)
liability company,)
Defendants.)

ORDER

17 This case is before the Court on Defendant Law Offices of Malkin & Associates
18 PLLC's ("Malkin & Associates") Motion to Quash Service of process predicated upon
19 Rule 12(b)(4), Federal Rule of Civil Procedure ("Fed.R.Civ.P."). (Doc. 10) Malkin &
20 Associates seeks an order quashing the service of process on it because service of the
21 summons and complaint on "[a] receptionist for Defendant [Malkin & Associates was]
22 not proper service under Federal Rule of Civil Procedure 4(e) because [defense] and
23 opposing counsel did not obtain a waiver." (*Id.* at 1) All parties have consented to
24 jurisdiction to a magistrate judge pursuant to 28 U.S.C. § 636(c). (Docs. 14, 16, 18)

25 After reviewing the parties' briefing and controlling Ninth Circuit authority, *Direct*
26 *Mail Specialists Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685 (9th Cir.
27 1987), the Court concludes Malkin & Associates' Motion is without merit and will be
28 denied.

1 **I. Background**

2 On November 20, 2012, Plaintiff SuperMedia LLC (“Plaintiff”), a Delaware
 3 limited liability company, wholly owned by SuperMedia Inc., a Delaware corporation
 4 with its principal place of business in Texas, filed this action against Malkin & Associates
 5 and Gregory Malkin P.L.L.C. (“Malkin P.L.L.C.”), Arizona professional limited liability
 6 companies. (Doc. 1) Plaintiff alleges causes of action for breach of contract, contractual
 7 breach of the implied covenant of good faith and fair dealing, and unjust enrichment. (*Id.*)
 8 The Complaint contends Plaintiff, successor-in-interest to Idearc Media LLC, is the
 9 publisher of the Verizon *Yellow Pages*, the *White Pages* telephone directories, and
 10 Superpages.com (collectively the “Directories”). (*Id.*, ¶ 5 at 1) From 2009 through 2011,
 11 Plaintiff and Malkin & Associates allegedly entered into contracts in which Malkin &
 12 Associates agreed to pay Plaintiff a monthly rate in return for Plaintiff’s publication of
 13 advertisements for Malkin & Associates in several Directories in the Phoenix area. Each
 14 contract is comprised of an advertising agreement signed by Gregory Malkin, a Phoenix
 15 attorney, who identified himself as the owner of Malkin & Associates. (*Id.*, ¶ 6 at 2)
 16 Plaintiff claims Malkin & Associates and its successor, Malkin P.L.L.C., owe Plaintiff
 17 \$124,135.46 for unpaid advertising published on behalf of Defendants. (*Id.*, ¶ 16 at 4)

18 The Complaint’s Wherefore Clause seeks “compensatory, incidental, conse-
 19 quential and/or restitutionary damages,” attorneys’ fees and costs, prejudgment and
 20 post-judgment interest, and such other and further relief as the Court may deem just and
 21 equitable. (*Id.*, at 6)

22 Plaintiff predicates subject matter jurisdiction on 28 U.S.C. § 1332, “[b]ecause the
 23 matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and
 24 costs, and is between or among citizens of different states.” (*Id.*, ¶ 4 at 2) Venue is based
 25 on the general venue statute, 28 U.S.C. § 1391(a)(1) and (2). (*Id.*)

26 Defendant Malkin & Associates’ Motion to Quash Service indicates Plaintiff
 27 attempted to serve the summons and complaint on Malkin & Associates by leaving the
 28 legal documents with a Malkin & Associates’ receptionist. According to Malkin &

1 Associates, “[t]his is not proper service under Federal Rule of Civil Procedure 4(e)
 2 because [Gregory Malkin] and opposing counsel did not obtain a waiver.” (Doc. 10 at 1)
 3 Malkin & Associates contends its “[r]eceptionist [was] not authorized by The LAW
 4 OFFICES of MALKIN & ASSOCIATES PLLC to accept service of process in this
 5 matter. Counsel for Plaintiff failed to obtain a waiver.” (*Id.*) Relying on *Larry M. Rosen*
 6 & *Associates, Inc. v. Hurwitz*, 465 A.2d 1114, 1117 (D.C. 1983), Malkin & Associates
 7 argues that service was invalid because “[a] receptionist in one’s office, even if
 8 authorized to sign for and open all of the mail, is not necessarily authorized to accept
 9 service of process.” (Doc. 10 at 2) In *Rosen & Associates*, the District of Columbia held
 10 the service of process was invalid when the complaint and summons were sent by
 11 registered mail to defendant’s corporate address and opened by a receptionist authorized
 12 to open letters addressed to defendant, even though the receptionist supposedly delivered
 13 a copy of summons and complaint to each defendant. 465 A.2d at 1117.

14 With its Response, Plaintiff provided the Court with the affidavit of William Bilyk,
 15 the process server utilized in this case, which describes the manner in which Malkin &
 16 Associates was served. (Doc. 12-1, Exhibit “Exh.” C at 12-13) No reply was filed con-
 17 testing the facts proffered in Mr. Bilyk’s sworn declaration. On November 20, 2012, and
 18 upon locating the law office of Malkin & Associates, the process server asked to speak
 19 with Gregory Malkin, the statutory agent for Malkin & Associates.¹ (*Id.*, ¶ 6) A woman,
 20 who identified herself as Karen Malkin, told the process server Mr. Malkin was busy and
 21 asked if she could assist the process server. (*Id.*) The process server explained he needed
 22 to serve legal documents to Mr. Malkin. (*Id.*) Ms. Malkin again said Mr. Malkin was busy
 23 and asked if she could accept service from the process server. (*Id.*, ¶ 7) The process

24

25 ¹ The public records with the Arizona Corporation indicate Malkin & Associates was
 26 administratively dissolved on November 27, 2012. (www.azcc.gov/scripts/cgi/dwispart2.pd,
 27 last viewed on January 21, 2013) Pursuant to Rule 201, Fed.R.Evid., a district court may
 28 properly take judicial notice of any fact “[c]apable of accurate and ready determination by
 resort to sources whose accuracy cannot reasonably be questioned.” *See Coto Settlement v.
 Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (district court may properly consider matters
 of public record).

1 server inquired whether Ms. Malkin was authorized to accept service. (*Id.*) Ms. Malkin
2 told the process server she was authorized to accept service. (*Id.*) Based on her represen-
3 tation she was authorized to accept service, the process server served Ms. Malkin with the
4 complaint, summons, and other legal documents by personally handing her all the
5 documents. (*Id.*)

6 Notwithstanding the undisputed evidence that Ms. Malkin was authorized to
7 accept service on behalf of Malkin & Associates, Plaintiff argues that service on Malkin
8 & Associates' receptionist was valid and lawful, citing *Direct Mail Specialists*, 840 F.2d
9 685 (9th Cir. 1987). The Court agrees.

10 **I. Jurisdiction**

11 Plaintiff predicates subject matter jurisdiction on complete diversity of citizenship
12 and the amount in controversy exceeding \$75,000, exclusive of interest and costs, citing
13 28 U.S.C. § 1332(a)(1). (Doc. 1, ¶ 4 at 2)

14 **II. Governing Law**

15 “[F]ederal courts sitting in diversity jurisdiction apply state substantive law and
16 federal procedural law.” *Zamani v. Carnes*, 491 F.3d 990, 995 (9th Cir. 2007) (citation
17 omitted); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)
18 (applying federal pleading rules, and noting that “[i]t is well-settled that the Federal Rules
19 of Civil Procedure apply in federal court, irrespective of the source of the subject matter
20 jurisdiction, and irrespective of whether the substantive law at issue is state or federal.”)
21 (citation omitted and internal quotation marks omitted)). Because jurisdiction in this case
22 is based on complete diversity and the amount in controversy exceeds \$75,000, exclusive
23 of interest and costs, Arizona substantive law applies to this action. *Tucker v. First Md.*
24 *Sav. & Loan, Inc.*, 942 F.2d 1401, 1406 (9th Cir. 1991).

25 **III. Service**

26 **A. Generally**

27 A federal court lacks jurisdiction over defendants who have not been properly
28 served in accordance with Federal Rule of Civil Procedure 4. *S.E.C. v. Ross*, 504 F.3d

1 1130, 1138 (9th Cir. 2007). “Rule 4 is a flexible rule that should be liberally construed so
 2 long as a party receives sufficient notice of the complaint.” *United Food & Commercial*
 3 *Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984) (citations omitted). “Indeed, ‘the purpose of service is to give the defendant notice of the institution of
 4 the proceedings.’” *Sweeney v. Darricarrere*, 2009 WL 2132696, at *4 (D. Ariz. July 14,
 5 2009) (quoting Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*,
 6 Civil 3d § 1094 at 511). “In determining whether service was valid, whether actual notice
 7 was given is ‘highly probative.’” *Id.* (citation omitted). “Nonetheless, without substantial
 8 compliance with Rule 4 ‘neither actual notice nor simply naming the defendant in the
 9 complaint will provide personal jurisdiction.’” *Direct Mail Specialists*, 840 F.2d at 688
 10 (citation omitted).

12 Federal Rule of Civil Procedure 12(b) permits a party to assert certain defenses by
 13 motion prior to the filing of a responsive pleading such as an answer. Among these
 14 defenses are challenges to the sufficiency of process and the sufficiency of service of
 15 process pursuant to Rules 12(b)(4) and 12(b)(5), respectively. Rule 12(b) also provides
 16 that “[a] motion asserting any of these defenses must be made before pleading if a
 17 responsive pleading is allowed.” Objections to service of process are waived if not timely
 18 raised. *Rudolph v. UT Starcom, Inc.*, 2009 WL 248370, at * (N.D. Cal. Feb. 2, 2009)
 19 (citing Rule 12(h)(1)); *McCurdy v. American Bd. of Plastic Surgery*, 157 F.3d 191, 194
 20 (3rd Cir. 1998) (citations omitted). When the validity of service is contested, the burden
 21 is on the plaintiff to prove that service was valid under Rule 4. *Brockmeyer v. May*, 383
 22 F.3d 798, 801 (9th Cir. 2004). If a plaintiff is unable to satisfy this burden, a district court
 23 has the discretion to either dismiss the action or retain the action and quash the service of
 24 process. *S.J. v. Issaquah School Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006)
 25 (where service of process is insufficient, “[t]he district court has discretion to dismiss an
 26 action or to quash service”) (citation omitted).

27 **B. The Summons**

28 “A motion brought pursuant to Rule 12(b)(4) challenges the form of process [the

1 summons] itself, rather than the service of process, the latter of which is addressed by
 2 Rule 12(b)(5)." *J & J Sports Prods., Inc. v. Torres*, 2011 WL 1586072, at *4 (E.D. Cal.
 3 April 25, 2011) (citing, *inter alia*, *McKinney v. Law Office of James Duncan*, 2010 WL
 4 668027, at *2 (N.D. Cal. Feb.19, 2010); James Wm. Moore, 2 Moore's *Federal Practice*
 5 § 12.33[3] (Matthew Bender 3d ed. 2010) ("Moving for dismissal under Rule 12(b)(4)
 6 challenges the process (or 'summons') itself, rather than service of the process."); *see*
 7 *also Chilicky v. Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1986) (Rule 12(b)(4) was
 8 "designed to challenge irregularities in the contents of the summons [and Rule 12(b)(5)
 9 the] irregularities in the manner of delivery of the summons and complaint[.]"), *reversed*
 10 *on other grounds by* 487 U.S. 412 (1988)). Rule 4(a) mandates the contents of a valid
 11 federal summons. *See Rule 4(a)(1)(A)-(G)*. The content requirements of a federal sum-
 12 mons are: it contains the court's and parties' names; is directed to the defendant; states
 13 the name and address of the plaintiff's attorney or, if unrepresented, the plaintiff; provides
 14 the deadline to respond to the complaint; states the consequences of failing to timely
 15 respond to the complaint; and bears the court clerk's signature and seal. *Id.*

16 Here, Malkin & Associates cites Rule 12(b)(4) as its authority for quashing
 17 service, doc. 10 at 1, but it does not identify any defect contained in the summons itself.
 18 In fact, the form of Plaintiff's summons employed in the November 20, 2012 service was
 19 adequate under Rule 4(a). (Doc. 2) Rather, Malkin & Associates challenges the validity
 20 of how the summons was served, not the summons' contents. The Court believes Malkin
 21 & Associates mistakenly relied on Rule 12(b)(4) and intended its dismissal motion be
 22 based on Rule 12(b)(5). The Court will analyze Malkin & Associates' motion on this
 23 belief.

24 **C. Service of a Summons**

25 Federal Rule of Civil Procedure 4 governs the service of process. Specifically,
 26 Fed.R.Civ.P. 4(h) addresses service on a legal entity, such as a corporation, partnership,
 27 or limited liability company, within or outside a judicial district of the United States. It
 28 provides that unless otherwise provided by federal law or a defendant's waiver of service

1 under Rule 4(d) has been filed, a legal entity may be served in any judicial district of the
2 United States as follows:

3

4 (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or
5 (B) by delivering a copy of the summons and of the complaint to an officer, a
6 managing or general agent, or any other agent authorized by appointment or by
7 law to receive service of process and--if the agent is one authorized by statute and
8 the statute so requires--by also mailing a copy of each to the defendant

9

10 Fed.R.Civ.P. 4(h)(1)(A)-(B). A defendant limited liability company, like Malkin &
11 Associates, may be served with process in Arizona pursuant to Fed.R.Civ.P. 4(h)(1). *See*
12 *Freemyer v. Kyrene Village II, LLC*, 2011 WL 42681, at *9 (D. Ariz., Jan. 6, 2011);
13 *Rodriguez v. Wright, Scott & Assoc., LLC*, 2009 WL 2730874, at *1 (E.D.N.Y. Aug. 28,
14 2009) (“In this case, plaintiff had the option of either serving defendant (1) in the specific
15 manner prescribed by Rule 4(h)(1)(B) of the Federal Rules of Civil Procedure, or (2) in
16 accordance with either the law of the state where service was made or the law of the state
17 where the court is located.”)

18

IV. Discussion

19

20 In *Direct Mail Specialists*, the Ninth Circuit affirmed the service of process on a
21 legal entity via service on a receptionist in circumstances similar to the case at bar. There,
22 a process server attempted to serve the corporate defendant by leaving the summons and
23 complaint with a receptionist who, unlike here, did not state she was authorized to accept
24 service. 840 F.2d at 687. The defendant did not respond to the complaint, and a default
25 judgment was entered. In a subsequent attempt to vacate the default judgment, the
26 defendant argued that it was not properly served pursuant to Rule 4 because service was
27 made only on the receptionist. *Id.* In affirming the validity of service, the court,
28 discussing the former version of Rule 4(h), which similarly authorized service by
delivering a copy of the summons and complaint to an officer, a managing or general
agent, or to any other agent authorized by appointment or law to receive service of
process, stated:

[D]espite the language of the Rule, service of process is not limited solely to officially designated officers, managing agents, or agents appointed by law for the receipt of process. The rules are to be applied in a manner that will best effectuate their purpose of giving the defendant adequate notice. Thus, the service can be made “upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service.” . . .

Id. at 688. Applying these service principles to the evidence that the defendant was a small company, the receptionist was the only person in the office when the process server arrived which demonstrated more than minimal responsibility was assigned to her, and evidence existed the appropriate person with the defendant actually received the complaint and summons, the Ninth Circuit held that service of process upon the receptionist satisfied Rule 4. *Id.* at 688–89.

Direct Mail Specialists remains valid authority in the Ninth Circuit addressing service of process. See *Spagnolo v. Nadic Network Certified Dentists*, 2011 WL 6012022, at *4-5 (D. Haw. Sept. 21, 2011), *report and recommendation adopted by* 2011 WL 6011803 (D. Haw. Dec. 1, 2011); *Grand Canyon Resort Corp. v. Drive-Yourself Tours, Inc.*, 2006 WL 1722314, at *3 (D. Ariz. June 22, 2006). Recently, the Arizona District Court applied the service principles in *Direct Mail Specialists* to the service of process in *United Van Lines, LLC, v. Plains Med. Ctr., Inc.*, 2011 WL 3684516 (D. Ariz. Aug. 23, 2012). In *United Van Lines*, a process server sought to serve a corporate defendant’s statutory agent at a corporate office. The process server was met by a receptionist, sitting at the front desk, who told him the process server the person to be served was no longer there. *Id.* at *2. The receptionist then referred the process server to another employee who was not a registered agent or an officer of the defendant. *Id.* The process server spoke with the employee who, like the facts in the case *sub judice*, said she had the authority to accept service for the defendant and accepted the process server’s legal documents. *Id.* The defendant moved to dismiss the complaint, claiming the employee was not authorized to accept service on behalf of the corporate defendant. *Id.* at *1.

1 Applying the service principles of *Direct Mail Specialists*, the district judge upheld
2 the challenged service, finding the defendant was “effectively served” because the
3 receptionist “[w]as sufficiently integrated with [the defendant] to know what to do with
4 the Summons and Complaint[]” and was “[i]n a position as to render it fair, reasonable
5 and just to imply the authority on [her] part to receive service.” *Id.* *2. The judge noted
6 the defendant did not argue the proper party did not receive actual notice of the complaint
7 and extenuating circumstances existed, such as, the process server’s attempt to serve the
8 proper service agent and his reliance upon the representations made to him. *Id.*

9 Here, Plaintiff’s service on Malkin & Associates is similar to that in both *Direct*
10 *Mail Specialists* and *United Van Lines*. The process server sought out Malkin &
11 Associates’ statutory agent and manager, Gregory Malkin. (Doc. 12-1, Exh. C, ¶ 6 at 13)
12 The process server, however, was not allowed to serve Mr. Malkin because he was told
13 by the receptionist, Karen Malkin, that Mr. Malkin was busy. *Id.* The process server was
14 then informed by Ms. Malkin that she was authorized to accept service so the process
15 server served the receptionist with the service documents. *Id.* at ¶ 7. It is undisputed the
16 statutory agent and manager, Gregory Malkin, received the legal documents served on the
17 receptionist, Karen Malkin, who is likely Mr. Malkin’s wife or other close relative with
18 the same last name. It is apparent that the receptionist in Mr. Malkin’s law office knew
19 what to do with the legal documents she received, and Malkin & Associates received
20 actual and timely notice of this lawsuit.

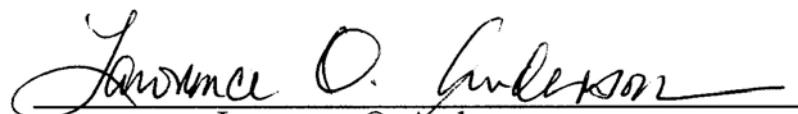
21 **V. Conclusion**

22 Based on the foregoing, and in light of the liberal construction of Rule 4, the Court
23 finds the receptionist for Defendant Law Offices of Malkin & Associates PLLC, Karen
24 Malkin, was in such a position *vis a vis* Malkin & Associates to render it fair, reasonable
25 and just to imply she had the authority to receive service of process on behalf of Malkin
26 & Associates. Therefore, the Court concludes Plaintiff’s service of process on Malkin &
27 Associates’ receptionist was sufficient to constitute lawful service on the Law Offices of
28 Malkin & Associates PLLC.

1 Accordingly,

2 **IT IS ORDERED** that Defendant Law Offices of Malkin & Associates PLLC's
3 Motion to Quash Service, doc. 10, is **DENIED**. Unless otherwise extended by the Court
4 upon a showing of good cause, Defendants must answer the Complaint on or before
5 **Friday, February 1, 2013.**

6 Dated this 22nd day of January, 2013.

7 
8
9 Lawrence O. Anderson
10 United States Magistrate Judge

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28